

1 A. That she identified him.  
 2 Q. Where was that in the record?  
 3 A. I think I put it in the report. And as  
 4 I recalled from the record, she identified him in  
 5 trial and it was presented to the jury she  
 6 identified him when shown photographs at the  
 7 hospital.  
 8 Q. Can you find that in the report?  
 9 A. No, I can't, I'm sorry. So I'm at a loss  
 10 on that one.  
 11 Q. Assuming that the photographic lineup  
 12 was not produced at trial -- not introduced into  
 13 evidence --  
 14 A. I know that for a fact.  
 15 Q. It was not?  
 16 A. Right, because it's not in the record as  
 17 being introduced.  
 18 Q. You still have the opinion then that the  
 19 photographic lineup prejudiced the trial even though  
 20 it wasn't introduced into evidence?  
 21 A. Yeah, because the jury was aware that  
 22 there was an identification made.  
 23 Q. How did the jury become aware of that if  
 24 it wasn't part of the evidence?

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1 A. It was either in her testimony or  
 2 presented in the -- as part the case by the  
 3 prosecutor.  
 4 Q. Wouldn't the prosecutor have to introduce  
 5 it into evidence to make it part of the case?  
 6 A. Yeah, it's either through her or through  
 7 the detective that was called to the stand, so --  
 8 Q. So your recollection --  
 9 A. That's the way I remembered it.  
 10 Q. Okay. Assuming that the detective that  
 11 was called to the stand did not testify concerning  
 12 the photo lineup and also Maria Gonzalez did not  
 13 testify concerning the photo lineup at trial, do you  
 14 still have the opinion that the photo lineup somehow  
 15 prejudiced Mr. Starks at trial?  
 16 A. Well, that's not at all what I remember,  
 17 so that -- the jury did know that, but you want me  
 18 to assume?  
 19 Q. Just assume, let's call it a hypothetical  
 20 question.  
 21 A. Yeah. So if I took it as a hypothetical  
 22 absent any other facts, if the jury was never aware  
 23 that there was a photo lineup --  
 24 Q. Correct.

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1 A. -- and the detectives never included it  
 2 as their recount of their investigation, then the  
 3 jury would not know and it would not be considered  
 4 as evidence.  
 5 Q. Correct.  
 6 A. And, therefore, it would be excluded from  
 7 their verdict.  
 8 Q. So then in your opinion, it would not  
 9 have a prejudicial effect on the trial?  
 10 A. As a hypothetical.  
 11 Q. Okay.  
 12 A. Taken that way.  
 13 Q. Do you agree that in composing a photo  
 14 lineup, the investigators should include only one  
 15 photo of the suspect in a photo array?  
 16 A. Yes.  
 17 Q. Was that done in this case?  
 18 A. Yes -- well, according to the record.  
 19 Q. Well, do you have any other information  
 20 that more than one photo of the suspect was included  
 21 in the photo array?  
 22 A. No.  
 23 Q. That's all we have is the record, is that  
 24 correct?

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1 A. That's all we have is the record and what  
 2 they said.  
 3 Q. Okay. Do you agree that an appropriate  
 4 number of fillers should be used in the photo  
 5 lineup?  
 6 A. Yes.  
 7 Q. Can you define what a filler is?  
 8 A. Similar -- subjects with similar  
 9 characteristics.  
 10 Q. And you believe that an appropriate number  
 11 of fillers were used in this case?  
 12 A. I only know the record says it was six  
 13 and that's an acceptable number.  
 14 Q. Do you agree that the photos in the photo  
 15 lineup should all be the same format, in other  
 16 words, Polaroid, 35 millimeter, color, black and  
 17 white, they should all be the same?  
 18 A. Yes.  
 19 Q. Do you agree that that was done in this  
 20 case, the fillers were all the same format?  
 21 A. Based on the record.  
 22 Q. Do you agree that the fillers and the  
 23 suspect should be uniform as to general physical  
 24 appearance?

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<p>1 A. Yes.</p> <p>2 Q. Do you agree that that was done in this</p> <p>3 case?</p> <p>4 A. Oh, I don't know. But having -- we</p> <p>5 don't have it, but it's been offered that that's</p> <p>6 the case.</p> <p>7 Q. Okay. So you don't have any opinions</p> <p>8 that it was not done in this case, is that correct?</p> <p>9 A. One way or the other, no.</p> <p>10 Q. Do you agree that after a photo lineup,</p> <p>11 police should do a written report concerning their</p> <p>12 photo lineup, is that correct?</p> <p>13 A. Yes.</p> <p>14 Q. And that was done -- a written report was</p> <p>15 done in this case?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And the written report should</p> <p>18 contain the names of all persons who were present</p> <p>19 for the photo lineup, is that correct?</p> <p>20 A. Yes.</p> <p>21 Q. And that was done in this case?</p> <p>22 A. I can't recall if they all were listed.</p> <p>23 Q. And you agree that the date and time and</p> <p>24 location of the procedure, in other words, the photo</p> <p style="text-align: right;">Page 57</p>	<p>1 departments?</p> <p>2 A. Yes.</p> <p>3 Q. And where was that standard contained?</p> <p>4 A. Well, we don't know if it's in Waukegan's</p> <p>5 standard because it's proffered that there were no</p> <p>6 such procedures. But that was -- that is a standard</p> <p>7 procedure used throughout the country and was used</p> <p>8 by me in the 1970's.</p> <p>9 Q. Okay. And do you know if it was used in</p> <p>10 the State of Illinois in 1986?</p> <p>11 A. I expected that it would be, but I don't</p> <p>12 know for sure.</p> <p>13 Q. So you don't know if it was a standard in</p> <p>14 the State of Illinois in 1986 to audio record photo</p> <p>15 lineups with victims, is that correct?</p> <p>16 A. Whether it was done generally throughout</p> <p>17 the state, no, I don't know.</p> <p>18 Q. And that's not contained in your report</p> <p>19 that an audio recording should have been made of the</p> <p>20 photo lineup, is that correct?</p> <p>21 A. Correct.</p> <p>22 Q. Why not? If it's a standard, why didn't</p> <p>23 you put it in your report?</p> <p>24 A. As I said, my report is devoted towards</p> <p style="text-align: right;">Page 59</p>
<p>1 lineup, should also be reflected in the report?</p> <p>2 A. Yes.</p> <p>3 Q. Was that done in this case?</p> <p>4 A. Yes.</p> <p>5 Q. Do you agree that the report should</p> <p>6 include some identifier for the photos that were</p> <p>7 used in this case?</p> <p>8 A. Yes.</p> <p>9 Q. And you agree that the photo numbers --</p> <p>10 numbers of the photographs were put in the report</p> <p>11 that the Waukegan Police Department did?</p> <p>12 A. Yes.</p> <p>13 Q. Do you agree that the documentation of</p> <p>14 the report also contained Maria Gonzalez's own</p> <p>15 words when she made the photo identification?</p> <p>16 A. Yes, it should be recorded as such.</p> <p>17 Q. And did they do that in this case?</p> <p>18 A. No.</p> <p>19 Q. They didn't put in the report what Maria</p> <p>20 Gonzalez said?</p> <p>21 A. I don't know, that's one of the problems,</p> <p>22 it should be audio recorded.</p> <p>23 Q. You're saying that in 1986, the standard</p> <p>24 was to audio record photo lineups by the police</p> <p style="text-align: right;">Page 58</p>	<p>1 the failure to keep adequate records of the</p> <p>2 identification process and the failure to keep the</p> <p>3 file.</p> <p>4 Q. Would an audio recording be included in</p> <p>5 your definition of keeping an adequate record of the</p> <p>6 identification process?</p> <p>7 A. Yes, it would.</p> <p>8 Q. And you didn't include that in the</p> <p>9 report?</p> <p>10 A. No.</p> <p>11 Q. Why not?</p> <p>12 A. Because I didn't know if it was done</p> <p>13 throughout the state at that time, but it is --</p> <p>14 well, let me say it this way: It is a bullet proof</p> <p>15 method to record what the identifier says, the</p> <p>16 victim says.</p> <p>17 Q. So is video record, is that correct?</p> <p>18 A. Audio recording.</p> <p>19 Q. Is video recording also a bullet proof</p> <p>20 method for keeping a record of the identification?</p> <p>21 A. Oh, yeah, it's a lot better.</p> <p>22 Q. Did you do that when you were an</p> <p>23 investigator?</p> <p>24 A. Not in the '70s, later on, yes.</p> <p style="text-align: right;">Page 60</p>

<p>1 Q. So standards change as time goes on, is 2 that correct?</p> <p>3 A. That's right.</p> <p>4 Q. And you don't have an opinion as to what 5 the standard was in the State of Illinois in 1986 in 6 recording photo lineups by police officers in the 7 state, is that correct?</p> <p>8 A. Not regarding the audio -- the use of an 9 audio recording.</p> <p>10 Q. Okay. You indicate in your report had 11 the identification procedure been adequately and 12 accurately preserved, Mr. Starks would have been 13 able to test the identification procedure, is that 14 correct?</p> <p>15 A. Yes.</p> <p>16 Q. Do you have any indication that Mr. Starks 17 did not try to test -- did test the identification 18 procedure or asked to test it?</p> <p>19 A. When? I mean, at the trial or --</p> <p>20 Q. Before his trial.</p> <p>21 A. Test it before his trial? No, I think he 22 left that entirely up to his attorney.</p> <p>23 Q. Okay. In your experience, is that 24 normally when an identification procedure is tested</p> <p style="text-align: right;">Page 61</p>	<p>1 Q. If it's a suggestive lineup, is that 2 correct, or if he feels it is?</p> <p>3 A. If the lawyer -- if a good lawyer sees it, 4 he does it.</p> <p>5 Q. If he feels it's suggestive?</p> <p>6 A. Well, you're asking me my opinion, that's 7 what my experience is.</p> <p>8 Q. Okay. As you indicate in your report, a 9 valid photo lineup can be a prosecution tool also, 10 is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. So if a defense lawyer sees that it's a 13 valid photo lineup, he may not want to have it 14 introduced into evidence because it would be harmful 15 to his client, is that correct?</p> <p>16 A. The strategies, I think, would be -- if 17 it's -- if it harms your case, you don't bring it 18 up.</p> <p>19 Q. Do you know if Mr. Starks' defense lawyer 20 had the ability to look at the photos used in the 21 photo lineup?</p> <p>22 A. I don't know.</p> <p>23 Q. Do you remember Detective Biang saying 24 that they would routinely or if a defense lawyer</p> <p style="text-align: right;">Page 63</p>
<p>1 by a defendant at a pretrial motion, a motion to 2 suppress?</p> <p>3 A. It's often done there.</p> <p>4 Q. And it can be revisited at a trial, is 5 that correct?</p> <p>6 A. Yes.</p> <p>7 Q. Was that done in this case?</p> <p>8 A. He did not contest the -- through his 9 lawyer, his lawyer did not contest the photo 10 identification.</p> <p>11 Q. Do you know --</p> <p>12 A. At the trial. In fact, it was never even 13 introduced at the trial.</p> <p>14 Q. And did he --</p> <p>15 A. As far as the six pack.</p> <p>16 Q. Did he contest it prior to the trial or 17 attempt to?</p> <p>18 A. I don't know, I didn't see it in the 19 record.</p> <p>20 Q. In your experience, that's one method 21 defense lawyers would use to test the validity of 22 an identification procedure would be by a pretrial 23 motion and hearing?</p> <p>24 A. A good lawyer does that.</p> <p style="text-align: right;">Page 62</p>	<p>1 asked to see the photos, they would produce them?</p> <p>2 MR. STAINTHORP: Objection to form.</p> <p>3 MR. TROBE: Q. Do you recall that?</p> <p>4 A. Yes.</p> <p>5 Q. Do you have any reason to believe that 6 those photos were not available to Bennie Starks' 7 defense lawyer?</p> <p>8 A. I don't know one way or the other.</p> <p>9 Q. Do you have any reason to believe that 10 the detectives could not have produced the actual 11 photographs used in the photo lineup to Bennie 12 Starks' lawyer?</p> <p>13 A. At the time of the trial, I do have no 14 reason to believe.</p> <p>15 Q. That they could have?</p> <p>16 A. Could not have.</p> <p>17 Q. And they could have testified concerning 18 their procedures prior to the trial or at trial, is 19 that correct?</p> <p>20 A. Yes.</p> <p>21 Q. And Maria Gonzalez could have testified, 22 is that correct?</p> <p>23 A. Yes.</p> <p>24 Q. So nothing in the record that you've seen</p> <p style="text-align: right;">Page 64</p>

1 would lead you to believe that anything that the  
 2 Waukegan police officers did would prevent Bennie  
 3 Starks' attorney from testing the validity of the  
 4 photo identification process in this case at the  
 5 time or before the trial?  
 6 A. No.  
 7 MR. KARAVIDAS: Can you repeat that question  
 8 and answer, please?  
 9 (The requested portion of the record  
 10 was read.)  
 11 MR. TROBE: Q. So up until the trial and to  
 12 the conclusion of the trial, the Waukegan Police  
 13 Department's procedures, record keeping were  
 14 sufficient to allow Bennie Starks' attorney to test  
 15 the identification procedure?  
 16 A. Yes.  
 17 MR. TROBE: I have to move my car, can we take  
 18 five minutes, is that all right?  
 19 THE WITNESS: That's a blessing.  
 20 (After a brief recess, the deposition  
 21 was resumed as follows:)  
 22 MR. TROBE: Q. Okay. You have on your --  
 23 can I see the report -- the copy of the report  
 24 that you're looking at, I notice you have some

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1 highlights on it. Did you place these highlights  
 2 on there?  
 3 A. Yes.  
 4 Q. You also have criticisms concerning the  
 5 destruction or the loss of the mug book files, is  
 6 that correct?  
 7 A. Yes.  
 8 Q. When was the first time that those photos  
 9 were ever requested?  
 10 MR. STANTHROP: Objection to form.  
 11 THE WITNESS: A. I don't know when they were  
 12 requested, the date. In this case, there was a  
 13 request on -- I have it indicated on page eleven and  
 14 twelve, I quoted the response.  
 15 MR. TROBE: Q. Do you know if the -- well,  
 16 you've already testified that to the best of your  
 17 knowledge, the photo identification process was not  
 18 challenged either prior to or at the trial of Bennie  
 19 Starks, is that correct?  
 20 A. Correct.  
 21 Q. And it was not an issue on appeal from  
 22 that conviction, did you read the appellate  
 23 decision?  
 24 A. Yes, and I remember -- and I listed it,

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1 it was centered around the DNA.  
 2 Q. So there was no issue raised on appeal  
 3 as far as you're aware of concerning the photo  
 4 identification, is that correct?  
 5 A. That I was aware of.  
 6 Q. Was the issue of the photo identification  
 7 raised in the post-trial motions or in the -- that  
 8 you know of?  
 9 A. Not that I know of.  
 10 Q. Do you know if the issue of the photo  
 11 identification issue was raised in the post-  
 12 conviction proceeding?  
 13 A. No, not that I know of.  
 14 Q. So when is the first time that you're  
 15 aware of that the issue of the photo identification  
 16 was ever raised in this case?  
 17 A. Well, the first time I'm aware of it is  
 18 during the litigation that we're here for.  
 19 Q. So in this case is the first time that  
 20 the photo identification conducted by the Waukegan  
 21 Police Department was ever raised as an issue, is  
 22 that correct?  
 23 A. That's my understanding.  
 24 Q. You indicate in your report that "the

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1 destruction of the mug shot book sometime after 1986  
 2 deprived Starks of the ability when his conviction  
 3 was undermined by DNA evidence to additionally  
 4 argue his rights were violated by unfair I.D.  
 5 procedures", is that correct?  
 6 A. Yes.  
 7 Q. When was his conviction undermined by DNA  
 8 evidence?  
 9 A. I think that came out in the -- the  
 10 appeals on the DNA evidence.  
 11 Q. Do you recall when that was?  
 12 A. As I sit here, no, I didn't pay attention  
 13 to those dates.  
 14 Q. So how did the destruction of the mug  
 15 shot books deprive Starks of his ability to argue  
 16 his rights were violated by unfair I.D.  
 17 procedures?  
 18 A. Well, I'm not a lawyer, so I don't know  
 19 how that would -- in my opinion, the destruction  
 20 of the books would influence that, but exactly  
 21 how --  
 22 Q. Well -- I'm sorry, I didn't realize you  
 23 were --  
 24 A. I'll wait for the further question.

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